

apart from what Lord Tomlin has said on similar transactions in the case of *Inland Revenue Commissioners v. Westminster*, *supra*, at page 21, something to the same effect was also said by Luxmoore L.J., in the Court of Appeal in the case of *Russell v. Inland Revenue Commissioners*,⁽²⁾ with regard to certain deeds of disposition made by a father to his children. This was a case in which various assessments were made in respect of sums claimed to have been paid for the benefit of children under three deeds of disposition. The Inland Revenue Commissioners had contended that there had not been any effective payment by the appellant of the sums stated under the deeds, or any effective charge on his income. This contention was upheld by the court of the first instance but reversed by the Court of Appeal, whose judgment was delivered by Luxmoore L.J., who said at page 196:—

"There being no attack on the genuineness or *bona fide* of the deeds.....it was not, in our judgment, open to Macnaghten J. to come to the conclusion he did."

Adopting the same view and having regard to what have been stated relating to the genuineness of the lease transaction, it was I think not open to the comptroller in this case to have come to the conclusion that the lease transaction was an artificial transaction within the meaning of section 29.

Accordingly, this appeal must be allowed with costs here and below, and there will be a direction that the tax assessment appealed against be annulled.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy, & Jones.*

ANGLO-AMERICAN CORPORATION LTD. v. GOODWOOD SAWMILL CO.

[O.C.J. (Gill J.) February 4, 1966]

[K.L. — Civil Suit No. 120 of 1964]

Hire-purchase agreement — Default in payment of instalments — Whether written notice condition precedent to termination of hiring — Retaking of possession — Claim for damages for wrongful termination.

The parties had entered into a hire-purchase agreement whereby the plaintiffs (the owners) let a cable winch tractor to the defendant company (hirer). The agreement provided that if the hirer should not pay to the owners any of the sums provided for, the owners would forthwith become entitled to immediate possession of the property. There had been default in payment and the plaintiffs had retaken possession of the cable winch tractor. They claimed arrears of hire-rent and cost of removal and the defendants counterclaimed for damages for wrongful termination of the hiring. The defendants claim was based on the fact that no notice of termination was given in this case.

Held: (1) whether a written notice is a condition precedent to the termination of a hiring in any parti-

cular case depends upon the true construction of the relevant clause in the hire-purchase agreement; a formal written notice is necessary only where there is an express stipulation to that effect in the agreement;

(2) where a notice to the hirer may be said to be an implied term of the agreement, all that is necessary is for the owner to make a declaration or to do some unequivocal act amounting to such a declaration to the hirer of his intention to terminate the hiring;

(3) in this case the plaintiffs had become entitled to immediate possession of the cable winch and the actual retaking of the possession amounted to a declaration on their part to terminate the hiring.

Cases referred to:—

- (1) *P. N. Pillay & Co. Ltd. v. Kah Motor Co. Ltd.* [1965] 1 M.L.J. 47.
- (2) *Abingdon Finance Co. Ltd. v. Champion Guardian*, Nov. 6th 1961, [1961] C.L.Y. 3931.
- (3) *North General Wagon and Finance Co. Ltd. v. Graham* [1950] 2 K.B. 7, 14.
- (4) *Reliance Car Facilities Ltd. v. Roding Motors* [1952] 2 Q.B. 844.

D CIVIL SUIT.

N. A. Marjoribanks for the plaintiffs.

Mah King Hock (M. S. Chooi with him) for the defendants.

Cur. Adv. Vult.

Gill J.: This action arises out of a hire-purchase agreement dated 6th May, 1963 whereby the plaintiffs (the owners) let a Model K565 cable winch complete with cable to the defendant company (the hirer). The plaintiffs' claim is for certain sums of money to which they allege they became entitled on their terminating the hiring by reason of the defendants' failure to comply with the terms of the agreement. The defendants are counterclaiming for damages for wrongful termination of the hiring.

Under clause 1 of the agreement the hire purchase price was \$51,348, of which a sum of \$13,593 was to be paid on the signing of the agreement and the balance by way of monthly hire-rent of \$2,098 on the 6th day of each month, the first of such payments to be made on the 6th day of June, 1963.

Clause 4 of the agreement provided that

"If the hirer shall not duly pay to the owners any of the sums herein provided to be paid.....then the owners shall forthwith become entitled to immediate possession of the property and may in every such case: (a) without prejudice to any claim for arrears of hire-rent or damages for breach of this agreement forthwith and without notice or demand terminate the hiring and retake possession of the property; and/or (b) by written notice either served personally on the hirer or sent by post or otherwise to the hirer or to his last known address forthwith for all purposes absolutely determine and end this agreement and the hiring hereby constituted and thereupon the hirer shall no longer be in possession of the property with the owners' consent nor shall either party thereafter have any rights under this agreement, but such determination shall not discharge any pre-existing liability of the hirer to the owners."

The amount payable under the agreement

up to and including 6th December, 1963 was \$28,279. Up to that date the hirer had in fact paid only a sum of \$17,897.53, leaving a sum of \$10,381.43 which was due and payable as on that date. This sum of \$10,381.43 forms the first part of the plaintiffs' claim.

On 23rd December, 1963, the plaintiffs sent two of their employees named Gulam Mohamed and Oei Kim Leong to the office of the defendant company at Kuala Kubu Bahru New Village with a letter addressed to them in the following terms:

" HANOMAG K565

Chassis No. 444231 Engine No. 65568 Frisch No. 17160

As you have failed to make payment against the above-mentioned tractor, we have instructed our Mr. Oei Kim Leong to repossess the tractor, charges for which will be for your account."

On arrival at Kuala Kubu Bahru, Gulam Mohamed showed the letter to one Yuen Kim Fook, a partner of the defendant company. Yuen Kim Fook, on seeing the letter, spoke on the telephone to the plaintiffs' manager requesting him not to take possession of the tractor, as he wished to find the money to pay the arrears of instalments then due, but the manager refused to accede to this request. However, the tractor was not taken away on that date as its starter was not in working order.

Gulam Mohamed went back to the defendants' sawmill a few days later (on or about 30th December, 1963) together with a man called Chow Kim Wah. They saw Yuen Kim Fook again and told him that their instructions were to take back the tractor. Yuen Kim Fook took them three miles into the jungle and there gave possession of the tractor which they brought back to Petaling Jaya. The plaintiffs are claiming a sum of \$500 being the cost of removal of the tractor, although they say that their actual cost was higher. Subsequently, in their letter dated 3rd February, 1964 the plaintiffs' solicitors wrote to the hirer: "Further to our letter dated 30th January, we are instructed to give you notice for all purposes that the hire purchase agreement is at an end."

Clause 6 of the agreement provided that

"If the hiring shall be determined.....after three months from the date hereof, the hirer shall pay to the owners by way of compensation for depreciation or otherwise.....(b) the amount (if any) by which the total amount due under clause one of this agreement to the date that the property is returned to the owners (including apportioned rent for any broken period) exceeds the total of the sums previously paid by the hirer to the owners under such clause, whichever is the greater. And the determination of the hiring as aforesaid shall not affect or prejudice any claim the owners may have against the hirer for payments due or for damages for breach of this agreement or the owners' rights to enforce such claim by action or otherwise."

Under this clause the plaintiffs are claiming a sum of \$10,381.43.

A The defendants do not dispute the facts of the case, apart from querying the amounts which the plaintiffs allege they spent in repairing and overhauling the tractor so as to make it resaleable, in that the amounts so stated include certain amounts by way of profits. But they contend that the plaintiffs committed a breach of the agreement by taking possession of the tractor without a prior written notice terminating the hire purchase agreement. For this contention they rely on the case of *P. N. Pillay & Co. Ltd. v. Kah Motor Co. Ltd.*⁽¹⁾ in which damages were awarded to the hirer for the seizure without notice by the owner of the subject matter of the hire-purchase agreement. That case was decided on the basis of a footnote at page 99 of *Goode on Hire-Purchase* on the case of *Abingdon Finance Co. Ltd. v. Champion*⁽²⁾ that

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D "Where the agreement states that the owner is to have the right to repossess *after* termination, this implies that the act of repossession cannot itself constitute the means of termination and that there must be some prior and independent act."

and that

"Any ambiguity in a hire-purchase agreement drawn up by a finance company must be construed in favour of the hirer."

E The hire-purchase agreement in that case provided that in default of

"Punctual payment of any of the hire-rentals..... the owners may immediately terminate the hiring and they shall thereupon without previous notice or demand become entitled to the immediate possession of the vehicle and to retake and resume possession of the same and the hirer shall thereupon no longer be in possession of the vehicle with the consent of the owners."

F The present case, however, is clearly distinguishable from that case. Under the agreement here the owners became entitled to immediate possession on the default by the hirer to pay the hire-rents on the due dates, whereupon they were at liberty "forthwith and without notice or demand (to) terminate the hiring and retake possession". As stated in the same footnote on *Goode on Hire-Purchase* starting at page 98,

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H "Where notice of termination is not required by the agreement, all that is necessary to bring the agreement to an end is some unequivocal act by the owner indicating his intention to treat the agreement as terminated. Repossession of the goods will normally suffice for this purpose."

Goode on Hire-Purchase in the text at the same page says,

I "A provision that in certain events the owner should have power 'to declare the hiring terminated' implies that notice is to be given to the hirer or some other act done which is equivalent to a declaration to the hirer that the owner regards the agreement as at an end. It is otherwise, however, if the agreement states merely that the owner 'may terminate the hiring'."

The case of *North General Wagon and Finance Co. Ltd. v. Graham*⁽³⁾ is often cited in

support of the proposition that no notice to terminate the hiring is necessary where the agreement provides that in certain events the owner "may terminate the hiring", although there was no finding of the court in that case that the agreement in question had actually been terminated. In that case by a hire-purchase agreement the hirer of a motor car agreed that he would not do anything which would tend to affect prejudicially the ownership or financial position of the owners in relation to the vehicle, and that he would not sell, loan, or part with its possession. Clause 7 of the agreement provided that on the failure of the hirer to observe or perform any stipulation into which he had entered, "the owners may terminate the hiring." The agreement contained no provision requiring that notice should be given as a condition precedent to its termination. In breach of the agreement the hirer placed the car with the defendant, an auctioneer, for sale, and it was sold by auction to the highest bidder. The owners brought an action against the auctioneer for conversion. It was held that on the breach by the hirer of his stipulations under the agreement, the owners had the right, not merely to terminate the agreement, but to the immediate possession of the motor car; that their right to possession arose as soon as the defendant was instructed to sell the car; and that, as they were entitled to possession of it when he sold it, they were in a position to maintain an action of conversion against him. Cohen L.J. in the course of his judgment said:

"The case is not altogether an easy one. It turns, as the judge said, on the question whether, on the true construction of the contract and in the events which have happened, the plaintiffs became entitled to possession. As a matter of construction I agree with my brother that cl. 7(i) of the agreement does not require notice as a condition precedent to the exercise by the plaintiffs of their right to terminate the hire. They can, I think, terminate the hire in any appropriate way, including the most obvious way of taking possession of the car."

Graham's case, supra, was considered in *Reliance Car Facilities Ltd. v. Roding Motors* (4) and distinguished. In that case a finance company financed the sale of a motor-vehicle by a hire-purchase agreement, supported by a recourse agreement with the vendors, a firm of motor-car dealers. By the recourse agreement "in the event of the termination of the hiring agreement" the dealers agreed to repossess the van and repurchase it from the finance company at the amount outstanding under the hire-purchase agreement. The hire-purchase agreement provided that if the hirer "made default in any . . . payment . . . the owner shall have the right . . . to declare the hiring terminated and to retake possession." The hirer defaulted and the finance company wrote to the dealers requiring them to repossess the vehicle from the hirers, and to pay for it in accordance with the recourse agreement. The dealers did not repossess the vehicle and

A refused to pay for it. In an action by the finance company against the dealers for the balance due under the hiring agreement, the Court of Appeal, reversing the decision of Sellers J., held that,

B "On the terms of the hire-purchase agreement, to terminate it, there had to be a declaration by the finance company communicated to the hirers, or, alternatively, an unequivocal act amounting to such a declaration to the hirers. The letter to the dealers, not having been brought to the notice of the hirers, did not amount to a declaration that the hiring agreement had been terminated, and, therefore, the hiring never having been terminated, the recourse agreement had never become effective, and the dealers were not liable."

C Denning L.J. spoke of "some unequivocal act equivalent to a declaration to the hirer such as an actual retaking of possession". Hodson L.J. in the course of his judgment stated as follows:—

D "The clause under consideration in this case is clause 3 of the hiring agreement which contains the words 'the owner shall have the right at any time to declare the hiring terminated,' whereas the words in *North General Wagon and Finance Co. Ltd. v. Graham*, which deal with a hiring agreement, were 'may terminate the hiring.' In this case nothing was done by the plaintiffs *vis-a-vis* the hirers to terminate the hiring. So, by the ordinary law of contract, the contract was not terminated and it could not, therefore, be properly said that by the letter of July 28, 1949, written by the plaintiffs to the defendants, any termination could have been brought about, because that was a letter not written to the hirers at all."

E It seems clear that whether a written notice is a condition precedent to the termination of a hiring in any particular case depends upon the true construction of the relevant clause in the hire-purchase agreement. A formal written notice is necessary only where there is an express stipulation to that effect in the agreement. Where a notice to the hirer may be said to be an implied term of the agreement, in my judgment all that is necessary is for the owner to make a declaration or to do some unequivocal act amounting to such a declaration to the hirer of his intention to terminate the hiring.

F In the present case under clause 4 of the hire-purchase agreement the plaintiffs became entitled to immediate possession of the tractor upon the failure by the defendants to pay their monthly instalments on the due dates. Undoubtedly on 23rd December, 1963, when they sent two of their employees to take possession of the tractor, they were entitled to possession. Clause 4(a) of the agreement provides that in such an event the plaintiffs were entitled forthwith and without notice or demand to "terminate the hiring and retake possession of the property." I think I will be right if I go so far as to say that clause 4(a) of the agreement was tantamount to saying that the plaintiffs may forthwith and without notice or demand terminate the hiring by retaking possession of the property. The utmost that can be argued on behalf of the

defendants in this case is that there had to be some declaration or some unequivocal act equivalent to a declaration on the part of the owners to the hirer in order to terminate the hiring. Actual retaking of possession has been held to be such a declaration. In this connection it is to be observed that the plaintiffs' employees retook possession of the tractor after showing to a partner of the defendant company a letter addressed to them by the plaintiffs that such repossession was being taken in consequence of their failure to make payment. This partner of the defendant company in fact took the plaintiffs' employees into the jungle and there gave possession of the tractor. Thus there was a clear indication by the plaintiffs of their intention to treat the agreement as terminated, and this intention was in fact conveyed to the defendants. If any written notice was required under the agreement at all it was under clause 4(b) of the agreement which was absolutely to determine and end the agreement for all purposes. This notice was in fact given by the plaintiffs by their letter dated 3rd February, 1964. In the circumstances I hold that the plaintiffs are entitled to succeed on their claim and that the defendants' counterclaim must fail.

There is no dispute about the plaintiffs' claim in respect of arrears of hire-rent and the cost of removal of the tractor. As regards their claim for a sum of \$10,381.43 by way of depreciation under clause 6(b) of the agreement, they have produced evidence to show that the amount spent on overhauling the tractor was \$5,480.05 and the amount spent on spares was \$10,528.44 which apparently included the cost of a second-hand engine at \$7,257.90 inclusive of approximately \$900 as profits. It has been admitted that the margin of profit on spares amounted to 50% and that an approximate profit of \$1,300 was included in the labour charges amounting to \$4,058. Nonetheless the cost of overhaul and repairs to the tractor exclusive of the profits would still be in the region of \$10,000. This, however, does not take into account the old engine of the tractor which presumably was not a complete loss. I would therefore allow a sum of \$7,000 by way of depreciation under clause 6(b) of the agreement which will be added to the sum of \$10,843.43 as the amount due and payable on the date of termination of the agreement and \$500 as cost of removal of the tractor. There will be judgment for the plaintiffs in the sum of \$18,343.43 and the defendants' counterclaim is dismissed. The defendants will pay the costs of the action.

Judgment for the plaintiffs.

Solicitors: Lovelace & Hastings; Chooi & Co.

PUBLIC PROSECUTOR v. LEE SENG SEH

[A.Cr.J. (Raja Azlan Shah J.) February 5 1966]

[K.L. — Criminal Appeal No. 77 of 1965]

Criminal Law and Procedure — Sentence — Adequacy of — Failure to furnish income tax returns — Income Tax Ordinance, 1947, s. 59(1).

Income Tax — Returns — Failure to furnish — Sentence.

The accused was convicted of three offences of failing to furnish returns of income tax and sentenced to \$25 on each charge. The Deputy Public Prosecutor appealed against the sentences imposed.

Held: (1) income tax offences are of a very grave character and the learned magistrate in this case should have considered not only the interest of the accused but also the interest of the public;

(2) the sentences were inadequate and should be increased to a fine of \$150 on each charge.

Cases referred to:—

(1) *Ambard v. Attorney-General for Trinidad* [1936] A.C. 322 at p. 336.

(2) *Jamieson v. Jamieson* [1952] A.C. 525 at p. 549.

(3) *Public Prosecutor v. Choo Swee Huat* [1963] M.L.J. 28.

CRIMINAL APPEAL.

Wan Hamzah (Deputy Public Prosecutor) for appellant.

R. Talalla for respondent.

Raja Azlan Shah J.: The respondent was charged with three offences under section 59(1) of the Income Tax Ordinance, to wit, he had failed to furnish within 21 days returns of income for the years 1963, 1964 and 1965. He was unrepresented in the court below and pleaded guilty to each of these charges. He was fined a sum of \$25 on each charge. Against that decision the learned Deputy Public Prosecutor has now appealed. There are four grounds of appeal, and to my mind they can all be taken together.

In exercising its jurisdiction to review sentence an appellate court does not alter a sentence on the mere ground that if it had been trying the case it might have passed a somewhat different sentence. As was said by Lord Atkin in *Ambard v. Attorney-General for Trinidad*:⁽¹⁾ "Sentences do vary in apparently similar circumstances with the habit of mind of the particular judge." Again, in *Jamieson v. Jamieson*,⁽²⁾ Lord Reid said that "human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions". It is only when a sentence appears to be wrong in law or is manifestly excessive or inadequate having regard to the facts and circumstances that an appellate court will interfere.

In the present case the learned magistrate viewed with concern the respondent's present